Filed 12/14/09 Larson v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LEE DERECK LARSON,
Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest.

E049492

(Super.Ct.No. FSB903904)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Brian S. McCarville, Judge. Petition granted.

Ann J. Cunningham for Petitioner.

No appearance for Respondent.

Michael A. Ramos, District Attorney, Grover D. Merritt, Deputy District Attorney, for Real Party in Interest.

INTRODUCTION

In this matter, we have reviewed the petition and the opposition filed by real party in interest. We have determined that resolution of the matter involves the application of settled principles of law and that issuance of a peremptory writ in the first instance is, therefore, appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

DISCUSSION

Code of Civil Procedure section 170.6, subdivision (a)(2), allows a peremptory challenge to a judge to be made on the grounds that the judge is "prejudiced against any party or attorney or the interest of the party or attorney." The motion may be made by "[a]ny party to or any attorney appearing in any action or proceeding." (*Ibid*.) Attorney Cunningham's first appearance before the court was on October 8, 2009, when she informed the court that she *might* be retained to represent petitioner, for whom the "conflicts panel" had been appointed on October 2. Even if we agree that attorney Cunningham should have known, or discovered at that time that Judge McCarville had been assigned to the case for all purposes, she had no standing in the case as she was not the attorney of record. Accordingly, she could not have challenged Judge McCarville at that time. Nor would it have made sense for petitioner's original attorney to have challenged Judge McCarville on the basis of bias against an attorney who had not yet been retained and might never be.

When attorney Cunningham appeared on October 15, 2009, to inform the court that she *had* been retained, she immediately presented an affidavit pursuant to Code of Civil Procedure section 170.6. Accepting, as we must (*Solberg v. Superior Court* (1977) 19 Cal.3d 182), the affidavit's claim that Judge McCarville was biased against *attorney Cunningham*, it was

indisputably timely. We think it is clear that a newly-retained attorney may file the challenge within 10 days of being retained if the judge has been assigned for all purposes; to hold otherwise would either deprive the client of his counsel of choice (if he elected not to retain the desired attorney) or compel him to go to trial with an attorney against whom the court might be biased. We so conclude at least in a case in which there is no suggestion that new counsel was retained solely or primarily to allow an otherwise-tardy challenge to the judge to be made.

We recognize that in this case, attorney Cunningham used a standard form in which she alleged that Judge McCarville was prejudiced against her *or* petitioner. We agree with the People that a challenge for bias against petitioner would have been untimely. Accordingly, we will grant relief on the condition that attorney Cunningham is willing to amend her declaration of prejudice to allege bias solely against her.

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino County to hold new proceedings on the question of the peremptory disqualification of Judge McCarville. If attorney Cunningham presents an amended challenge in which she relies on a claim of bias solely against her, the court shall accept it as timely. Otherwise, the challenge may be rejected.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

KING
J.